

Please note this correction to the January issue of the BOP Update.

Thanks to a careful reader for pointing out a need for a clarification in the January issue of the BOP Update. On page 15 of the *Update* in the *Did You Know?* column, under the heading "Access to Client Records," patient access to mental health records is discussed. California Health and Safety Code §123115(b) addresses a patient's access to his or her mental health records, however, this California law has been partially preempted by federal law and regulations under HIPAA.

With regard to "psychotherapy notes" as they are defined in HIPAA (45 C.F.R. § 164.501), the California standard prevails and should be applied in determining whether to allow a patient access to his or her records. That is, if a health care provider determines there is a "substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of the records," the provider may decline inspection under the conditions outlined in Health & Safety Code § 123115(b).

Psychotherapy notes, as defined in HIPAA, means "notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record." 45 C.F.R. § 164.501. However, the definition specifically excludes "medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." *Id.*

However, with regard to "mental health records" *other than* psychotherapy notes, the federal HIPAA standard preempts the California standard and should be applied to determine whether access should be permitted. "Mental health records" are defined in Health & Safety Code §123105(b) as "patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder." It includes all alcohol and drug abuse records. *Id.* Under HIPAA, a provider may deny an individual access, provided that the individual is given a right to have the denial reviewed, in the following circumstances:

- (i) A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person;
- (ii) The protected health information makes reference to another person (unless such other person is a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to such other person; or
- (iii) The request for access is made by the individual's personal representative and a licensed health care professional has determined, in the exercise of professional judgment, that the provision of access to such personal representative is reasonably likely to cause substantial harm to the individual or another person.

45 C.F.R. § 164.524(a)(3).

To be valid, the denial must be subject to review under the conditions found in 45 C.F.R. § 164.524(a)(4).

We apologize for any confusion.

Board of Psychology